



Law Society of Kenya v Insurance Regulatory Authority & 3 others; Kiki Investments Ltd & 2 others (Interested Parties) (Petition 44 of 2018)
[2022] KEHC 11091 (KLR) (Constitutional and Human Rights) (31 May 2022) (Judgment)

Neutral citation: [2022] KEHC 11091 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS

PETITION 44 OF 2018

HI ONG'UDI, J

MAY 31, 2022

BETWEEN

LAW SOCIETY OF KENYA PETITIONER

AND

INSURANCE REGULATORY AUTHORITY 1ST RESPONDENT

COMMISSIONER OF INSURANCE 2ND RESPONDENT

POLICY HOLDERS COMPENSATION FUND 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

AND

KIKI INVESTMENTS LTD INTERESTED PARTY

MUMBU HOLDINGS LTD INTERESTED PARTY

JEAN MUMBI NGENGI INTERESTED PARTY

JUDGMENT

1. The petition dated 5th February 2018 was filed under Articles 10, 19(2), 20(1), (2), (3) & (4), 21(1), 23(3), 40(3), 41, 47(1), 48, 50(1), 258(1) and 259(1) in light of Section 67C of the [Insurance Act](#) Cap 487, Laws of Kenya.
2. Accordingly the petition seeks the following orders: -



- i. A declaration that the fundamental rights and freedoms of the concerned parties including members of the public, the policy holders, accident victims, advocates and creditors have been violated;
- ii. A declaration that Section 67C (2)(i),67C(3) and 67C(10) of the *Insurance Act* are unconstitutional and contravene Article 40,46,47 & 50(1) of *the Constitution*;
- iii. An order directing the respondents to take measures that the Court may deem fit to bring closure to the continued Statutory Management United Insurance Company, Concord Insurance Company Ltd, Blueshield Insurance Company Ltd and Standard Assurance Company Ltd.
- iv. Costs of this petition.
- v. Any other relief that this Honourable Court may deem fit.

The Petitioner's Case

3. The crux of this petition is that the 1st and 2nd respondents under Section 67C of the *Insurance Act*, are granted the power to intervene in management of financially unstable insurance companies. Among these powers are supervision, monitoring and statutory management of these companies. In essence the petition asserts that the 1st and 2nd respondents are in breach of this duty as they have failed to conduct the required statutory management of United Insurance Company, Concord Insurance Company Ltd, Blueshield Insurance Company Ltd and Standard Assurance Company Ltd. It is the petitioner's case that the 1st and 2nd respondents have misused their powers which they are legitimately expected to exercise reasonably, diligently, expeditiously and in the public's interest.
4. The case as supported by Mercy Kalondu Wambua's affidavit of 5th February, 2018, is that the petitioner at the time of filing this petition had been receiving numerous complaints from its members with reference to placement of various insurance companies particularly those engaging in Public Service Vehicle Insurance under lengthy periods of statutory management with never ending moratoriums on payment of claims and other liabilities. This she avers has caused great injustice to the victims of accidents, policy holders and practitioners.
5. She depones that United Insurance Co. Ltd was initially placed under statutory management of the Kenya Re-insurance Corporation on 15th July 2005 and a moratorium period of 12 months. This period was continually extended and at the time of filing this suit it had been 13 years since. As a consequence, she makes known that the 1st respondent in the case of Misc Application No. 1345 of 2005 (Os) - Kensilver Express Ltd, Simon Kimutai Chepkwony, Peter Njuguna Njathi & Nancy Wanjiru Kimani V Commissioner Of Insurance, Minister For Finance, Attorney General & Statutory Manager, United Insurance Company Limited was found liable for violating the constitutional rights of various petitioners in the manner of the appointment and operations of the then statutory management.
6. She further depones that a similar verdict was passed with reference to the 1st and 2nd respondents in the case of Sammy M. Makove, Commissioner of Insurance V Kenya Reinsurance Corporation (Statutory Manager) & Another [2012] eKLR. That in spite of this the 3rd respondent has continued to extend the moratoriums.
7. In the same way, Concord Insurance Company Ltd was placed under statutory management vide Gazette Notice No.2194 on 6th February 2013 and declared a moratorium for a period of 12 months. It is averred that the statutory manager and the 3rd respondent have continually vide court orders extended



this period over the years since then. Similarly, Blueshield Insurance Company Ltd and Standard Assurance Co. Ltd were placed under statutory management on 16th September 2011 and 11th March 2009 respectively.

8. It's her disposition that the 1st, 2nd and 3rd respondents have abused this power by purportedly installing managers and issuing infinite moratoriums perpetually. They have further failed to monitor and take note of insurance companies facing liquidity at early stages to protect the public's consumer rights in a timely manner. As such she avers that their conduct and performance is offensive to the spirit and letter of *the Constitution*.
9. She depones that the provisions of Section 67C of the *Insurance Act* on the appointment of statutory managers and declarations of moratoriums and the set practice in past appointments is contrary to the provisions of *the Constitution*. In particular, Section 67C(2) (i), 67C(3) and 67C(10) since the provisions don't set out how the powers of the statutory manager can be challenged and the expected period in office of a statutory manager contrary to Articles 48 and 50(1) of *the Constitution*. Secondly that the provisions effect deprivation and limitation of property contrary to Article 40(2) of *the Constitution*. Thirdly they are inconsistent with Article 46 of *the Constitution* since they rob consumers of their economic interest and compensation for loss or injury arising from defects in the insurance service. It is for this reason she prays that these provisions should be declared unconstitutional.
10. The petitioner in her further affidavit dated 9th July 2019 in response to the 1st and 2nd respondent's replying affidavit, opposes the respondents' averments. She depones that they have not always acted in the best interest of the stakeholders. To buttress this point she cited the conviction of Johnson Jackson Githaka a director with Kenya Re-insurance that was the statutory manager of United Insurance Company Ltd. It is her disposition that the 1st and 2nd respondents cannot evade blame over the mishaps of their statutory managers. This is because it is their lack of diligence in removing the statutory managers and detecting the insurance companies with liquidity problems in good time that has caused the mishaps thus failing to protect the public.

The Respondents case

The 1st & 2nd Respondents' case

11. The 1st and 2nd respondents filed a replying affidavit sworn by Godfrey K. Kiptum, the acting Commissioner of Insurance and Chief Executive Officer of the 1st respondent on 28th March, 2018. He avers that the law relating to the appointment of statutory managers, declaration of moratoriums and intervention in the management of an insurer is geared towards the protection of public interest. This is because the intervention is with a view to revive or ensure an orderly exit from the market.
12. He avers that the extension of the moratoriums is done in a bid to ensure the insurance company's assets are not exposed and the interest of policy holders is not jeopardized. He explains this to be the reason for the extension of statutory management and moratoriums for United Insurance Company, Concord Insurance Company Ltd, Blueshield Insurance Company Ltd and Standard Assurance Company Ltd through several Court orders over the years. This history is seen in the detailed account of each company in his affidavit.
13. Based on this account he avers that the petitioner's assertion that the constitutional rights of the affected parties were violated is unjustified for a number of reasons. To begin with, no particulars have been provided to show how the implementation of the respondents' statutory mandate amounts to violation of the cited rights. He points out that they have exercised this mandate under the strict supervision of the High Court and all extensions done with the Court's sanction.



14. Further that any interested party has always been at liberty to challenge their decision which has been done as evidenced by the various Court cases. In fact he avers that if there be delay in the management process it can be attributed to the various court cases and engagement with the various stakeholders.
15. He depones that at the time of filing this suit the current status of United Insurance Company, Concord Insurance Company Ltd, Blueshield Insurance Company Ltd and Standard Assurance Company Ltd in the statutory management was at advanced stages and it is in public interest the intervention process be allowed to proceed without hindrance to expedite its conclusion.
16. It is their case that they have carried out their mandate in good faith and within the confines of the law with the goal of balancing the interests of policy holders, shareholders, decree holders against the insurance companies and interested parties for the public good. It is on this premise he concludes by stating that the petition is misconceived and without merit.
17. The 1st and 2nd respondents in addition filed three further affidavits. The first two were supplementary affidavits dated 20th November 2018 in response to the 1st and 2nd interested party's case and another dated 9th January 2019 in response to the 3rd interested party's case. Finally is the further affidavit dated 30th July 2019 in response to the petitioner's further affidavit.
18. The 1st and 2nd respondents while reiterating the contents of their replying affidavit denied the assertions by the interested parties which the deponent avers are not supported by any documentary evidence. With reference to the 3rd interested party's assertions, he notes that the exercise of the statutory manager's mandate is not one of the issues in this petition.
19. While reiterating the contents of their replying affidavit he depones that the criminal culpability of a statutory manager does not translate to culpability on the part of the respondents. In fact he deposes that the conviction of the statutory manager proves that there is a system of checks and balances to counter abuse of office by any person mandated as a statutory manager.

The 4th Respondent's Case

20. In opposition to the petition, the 4th respondent filed the following grounds of opposition dated 27th February 2018:-
 - i. Section 67C (2) (i), 67C (3) and 67C (10) of the *Insurance Act* is constitutionally aligned to Article 40(3)(b)(ii) of *the Constitution*.
 - ii. Section 67C(3) of the *Insurance Act* provides that the maximum duration of 12 months of a statutory manager after appointment by the Commissioner of Insurance, subject to extension by the High Court as may appear justified upon application of the Commissioner.
 - iii. From the foregoing the moratorium has been extended since the 1st respondent persuaded and justified to the Court the need for the extension.
 - iv. Being that the court proceedings are open to the public the petitioner had and still has an opportunity to challenge the extension of the moratorium in the respective court proceedings.
 - v. For those reasons the petition is misconceived, mischievous and an abuse of the Court process and does not disclose a cause of action against the 4th respondent.
21. The 4th respondent filed further grounds of opposition dated 8th December 2021 as follows:-
 - i. The petitioner has misconstrued and misapplied the objects and purpose of the impugned sections of the *Insurance Act*, Cap.487 of the Laws of Kenya.



- ii. The petitioner has not rebutted the general presumption of constitutionality that is enjoyed by the impugned Section 67C (2) (i), (3), (4) & (10) of the *Insurance Act*, Cap.487 of the Laws of Kenya.
- iii. The petitioner's case is pegged on the difficulty to comply with Section 67C(2)(i), (3), (4) & (10) of the *Insurance Act*, Cap.487 of the Laws of Kenya which cannot be construed to be a violation of the rights of the petitioner neither a reason to render a law unconstitutional.
- iv. Enforcement of the impugned law by its established agencies has been misconstrued by the petitioner to constitute the alleged violations of its constitutional rights.
- v. The petitioner's allegations of violations under Articles 40(2), (3), 46, 47(1), 48 and 50(1) of *the Constitution* have neither been specifically pleaded nor sufficiently proved.
- vi. The object and purpose of the impugned law will be defeated if the petition is allowed.
- vii. The petition has not been pleaded with specific particularity falling short of the threshold set out in the Anarita Karimi Njeru and Mumo Matemu case.
- viii. The reliefs sought by the petitioner are ambiguous and not capable of being lawfully explained.
- ix. The petition is speculative and repulsive to the constitutional ideals of good governance, effective and efficient administration of justice, social order as well as protection and promotion of the rights and fundamental freedoms of other members of the public and respect and support for lawfully established agencies of government.
- x. Contrary to the petitioner's allegations the affected insurance companies were lawfully placed under statutory management, the statutory managers lawfully appointed, moratoriums lawfully placed and extensions granted legally through the exercise of judicial discretion.
- xi. Contrary to the petitioner's allegations, the powers of the statutory managers under the impugned law can be lawfully challenged under the laws of Kenya in light of the provisions conformity to *the Constitution*.
- xii. The rights and fundamental freedoms under Articles 40(2), (3), 46, 47(1), 48 and 50(1) of *the Constitution* that have been alleged to have been violated are not absolute in nature and should be enjoyed subject to the limitations imposed under Article 24 of *the Constitution*.
- xiii. The allegation by the petitioner that their right under Article 47(1) of *the Constitution* has been violated is without any legal basis, furthermore that the petitioner's right under Article 46 of *the Constitution* has not been violated. Similarly that the petitioner's arguments in support of the alleged legitimate expectation are vague and unsubstantiated.
- xiv. The public interest considerations urged by the petitioner are inchoate and at variance with lawful court orders from courts of competent and concurrent jurisdiction that extended the period of the impugned moratoriums.
- xv. The allegations of loss suffered by the petitioner are based on hearsay as the evidentiary burden in support thereof has not been discharged.
- xvi. The petition is an appeal against the decisions of the courts of competent and concurrent jurisdiction, contrary to Article 164(3)(a) of *the Constitution*.
- xvii. orders sought by the petitioner, if granted, will hamper the constitutional and statutory mandate of the respondents which this Court should guard against.



- xviii. From the foregoing the petition is bad in law and devoid of any merits and thus an abuse of the due process of the Court.

The Interested parties' case

The 1st and 2nd Interested parties case

22. The 1st and 2nd interested parties filed their replying affidavit dated 23rd October 2018 sworn by one of United Insurance Company Limited shareholders, George Ngure Kariuki, the 1st interested party's director.
23. Referring to United Insurance Company Limited he avers that the Company was incorporated on 28th April 1983. It was licensed as an insurer on the same day with its main promoters and only shareholders being the 1st & 2nd interested parties and Kiragu Holdings Ltd. He avers that the company ran successfully until the year 2004 when it started facing cash flow challenges that led to the appointment of Kenya Re-insurance Corporation as the statutory manager on 15th July 2005 under Section 67C of the *Insurance Act*.
24. He avers that in 2006 the statutory manager issued a status report of the company to the 2nd respondent whilst recommending that the company be liquidated. The 2nd respondent in effect commenced the winding up proceedings under Section 67C(6)(ii) of the *Insurance Act* vide Winding up Cause No.22 of 2006 in the Matter of United Insurance Company Ltd. This move was challenged by the shareholders through an application to the High Court. The Court directed that the factual position of the Company be first ascertained.
25. In view of this, the statutory manager was directed by the 2nd respondent to form a working committee to ascertain the factual position of the company. It comprised of 11 members two of whom were shareholders. In performance of this task, the committee appointed Deloitte & Touche to prepare and submit audited accounts of the company for the period between 2004 to 2010.
26. The committee discovered that the statutory manager had failed to complete its tasks on the securing of the company's assets leading to the loss of some assets. Secondly that it had failed to order for the verification of claims and obtain audited accounts of the company. He avers that this information was not disclosed to the shareholders and that the moratorium had been applied selectively in respect of some creditors.
27. In the end the committee submitted a report to the effect that its recommendations would see the company's management shift from the statutory manager to the shareholders. The 2nd respondent vide a letter dated 29th September 2011 directed the committee to submit a proposal within 14 days. In brief, the shareholders and committee recommended liquidation of the company by disposal of the company's immovable assets and sales used to settle the company's liabilities. Conversely they also recommended that the company had potential of being restructured and revived.
28. It is deposed that the statutory manager on 15th November 2011 submitted the status report as if it was its own and proceeded to amend the proposal to the exclusion of the shareholders. The statutory manager amended the recommendations to be that the company was capable of being revived under Section 67C (6)(9)(ii) of the Act and proposed disposal of 50% of the immovable assets of the property. This he avers was done in bad faith.
29. Owing to the committee's and Deloitte & Touche findings he avers that the statutory manager during its tenure has failed to discharge its duties in compliance with the law hence prejudicing the company,



- policy holders and the public. This is since it sold some of the company's assets and failed to utilize the proceeds to benefit the company.
30. In addition, despite the declaration of moratorium, it allowed the company's creditors to utilize the company's assets to offset unverified claims, in contravention of Section 67(10) of the *Insurance Act*. It further failed to maintain proper records and documentation of its operations. He avers that while the company's assets were being disposed there was no disclosure on the manner, criteria and collections made to the shareholders.
 31. He avers that even with the appointment of a caretaker board by the 2nd respondent to work with the statutory manager by recommending the best ways to revive the company, the same proved futile as the statutory manager refused to co-operate with the board and adhere to the 2nd respondent's instructions.
 32. The 2nd respondent eventually on 25th September 2013 informed the statutory manager of expiry of its tenure and appointed Evanson Munene Waruhiu as the new statutory manager for a period of three months to continue working with the caretaker board. The 2nd respondent later on 26th June 2015 appointed the Policy Holders Compensation Fund Limited the 3rd respondent herein as the new statutory manager.
 33. The deponent avers that the term of statutory management of the company has caused more harm than good. It is on this premise that he claims that Section 67C 2(1) and (5) of the *Insurance Act* are unconstitutional. This is because the 1st and 2nd respondents have absolute discretion to appoint statutory managers without regard to the conflict of interest that may exist between the appointee and the company hence violating Article 48 of *the Constitution*.
 34. Furthermore, that the appointment of a statutory manager has the effect of denying the owners of the company their right to property under Article 40 of *the Constitution*. Finally, that the appointment of the statutory managers violates Article 35 of *the Constitution* since the interested parties in the matter can only access information of the company at the discretion of the manager.

The 3rd Interested party's case

35. The 3rd interested party, Jean M. Ngengi the operations manager at Blueshield Insurance Company Ltd and a shareholder sought to rely on her supporting affidavit as sworn in her Notice of Motion application dated 18th April 2018. She avers that Blueshield Insurance Company Ltd was placed under statutory management on 16th September 2011 by the 2nd respondent and Eliud Muriithi appointed as the statutory manager. Further that Mr. Muriithi did not have any interest in the role and secured a new job with the Nyeri County Government soon after. As a result the 3rd respondent was successfully appointed as the new statutory manager.
36. She avers that failure by the 2nd and 3rd respondents to avail the Report and statement of affairs of the company caused the shareholders to make a report to the Directorate of Criminal Investigations (DCI) on 4th February 2016 with the view to investigate the misappropriation of the rental income collected by the statutory manager from the tenants at Blue shield Towers.
37. The DCI besides of recording statements and receiving the necessary documentation requested the Auditor General vide a letter dated 9th March 2016 to audit the documents of the company. In its report dated 2nd August 2016 the Auditor General identified irregularities on the part of the 2nd respondent and two statutory managers appointed by him.
38. She depones that in view of the irregularities, the decision to wind up the company as mandated by the 2nd respondent on 22nd May 2017 under Winding Up Cause No.238 of 2017 was aimed at obstructing



the investigations of the DCI into the culpabilities of the statutory managers of the company. This decision was conversely stayed by the Court of Appeal on 4th December 2017 in Civil Appeal No.360 of 2017.

39. She contends that any extension of the statutory management period of the company is unattainable in light of the Auditor General's report and the ongoing investigations by the DCI. It is on this premise that she avers that the shareholders of the company should not continue being deprived of their property on account of the deliberate acts and omissions of the respondents and statutory managers.

Parties' submissions

The Petitioner's submissions

40. On behalf of the petitioner, the firm of Guandaru Thuita and Co. Advocates filed written submissions dated 9th March 2020 and a list of authorities dated 11th March 2020. Counsel identifies the following as the issues for determination:
- i. Whether the provisions of Section 67C(2)(i),67C(3) and 67C(10) of the Insurance Act are unconstitutional;
 - ii. Whether the fundamental rights of the petitioner's members and the public have been violated by the 1st,2nd and 3rd respondent in the exercise of the powers under Section 67C(2)(i),67C(3) and 67C(10)of the Insurance Act;
 - iii. Whether the petition is proper; and
 - iv. Whether the petitioner is entitled to the orders sought.
41. On the first issue counsel urges the Court to be guided by the principles espoused under Article 259 of the Constitution as highlighted in the case of Council of County Governors v Attorney General and another (2017) eKLR. In addition Counsel notes that the Court should be guided by the authorities such as Geoffrey Andare v Attorney General & 2 others(2016)eKLR that set out the principles to be considered in declaring Sections of a statute unconstitutional. In essence Counsel submits that the principles require the Court to contrast the provisions of the Constitution with those of the legislation in issue and determine from the purpose and effect of the legislation the constitutionality of the provisions. He informs that this was the reasoning that was applied by the three judge bench in the case of Kenneth Otieno v Attorney General & another (2017)eKLR which he cited in support.
42. In view of this he submits that the impugned Act deals with the issue of governance of financially unstable insurance companies nonchalantly. He compares this with other sectors such as banking which have the Kenya Deposit Insurance Act to deal with every aspect of receivership or liquidation. He notes that the impugned provisions have several gaps and are ambiguous as observed by the Court in the case of Sammy Makove, Commissioner of Insurance v Kenya Reinsurance Corporation (Statutory Manager) & another (2012) eKLR. Additional reliance was placed on the case of Katiba Institute & another v Attorney General & another(2017) eKLR and Kenya Bankers Association v Attorney General & another; Central Bank of Kenya(Interested Party) 2019 eKLR. It is his contention that an average citizen as a result is unable to tell the scope of the impugned provisions and how they should be enforced.
43. In addition, Counsel submits that in view of Article 40 of the Constitution the impugned provisions pave way for the affected parties to be deprived of their property arbitrarily as they lack the ability to question the statutory manager's powers and decisions as evidenced in the interested parties' affidavits. He argues that this aspect deprives the members of the public, policy holders, creditors and other



affected persons the right to access justice under Article 48 of the Constitution and right to a fair hearing under Article 50(1) of the Constitution.

44. In the same way, Counsel submits that the lack of defined length of time in office of a statutory manager is problematic as it has paved way to numerous extensions in effect depriving the affected persons the protection guaranteed under Article 47 of the Constitution. Furthermore, that the provisions violate Article 46 of the Constitution as they deprive the said consumers their economic interest and compensation for loss arising from defects in the insurance service. This is because they cannot be paid as long as there is statutory management and a moratorium over the insurance company.
45. Speaking to the other aspect of the impugned provision, Counsel submits that its effect has produced chaos and agony to the parties involved. He asserts that the 1st and 2nd respondents being public officers are legitimately expected to perform their roles with the purpose of forestalling loss to the public, policy holders, shareholders and other parties but have so far failed to do so. To this end he argues that the effect of the impugned provisions has failed by allowing the statutory managers to abuse the powers provided.
46. On the second issue, Counsel submits in light of the above argument that Articles 40, 46, 47, 48 and 50 have been violated by the 1st, 2nd and 3rd respondents.
47. On the third issue counsel contends that the letter and spirit of the impugned provisions are vague, ambiguous and inconsistent with the Constitution. He argues that the petitioner does not seek to challenge the decisions of other courts in similar matters which were on extension of periods of moratoriums but the underpinnings of the provisions that allow the 1st and 2nd respondents to exercise power under Section 67C of the Insurance Act. In light of this he submits that the petition is properly placed before this Court.
48. Lastly Counsel submits that the petitioner ought to be granted the remedies sought as it has satisfied all the conditions that are required to have a provision declared unconstitutional as demonstrated in the submission herein.

The 1st, 2nd and 3rd Respondents' submissions

49. Coulson Harney LLP on behalf of the 1st, 2nd and 3rd respondents' filed written submissions and a list of authorities dated 29th January 2021. The respondents identify three issues for determination as follows:
 - i. Whether the 1st, 2nd and 3rd respondent violated the rights of the public under Articles 40 (2) and (3), 46, 47 (1), 48, 50 (1) of the Constitution of Kenya;
 - ii. Whether the extensions of the moratoriums in the continued Statutory Management of United Insurance Company, Concord Insurance Company Limited, Blueshield Insurance Company Limited and Standard Assurance Company Limited were in accordance with the law; and
 - iii. Whether Sections 67C (2) (i), 67C (3) and 67C (10) of the Insurance Act, Cap 487 are unconstitutional and void to the extent of the inconsistency.
50. On the first issue Counsel submits that Section 67C of the Insurance Act has an inbuilt mechanism to counterbalance the particular circumstances under which a statutory manager may be appointed. He notes that these safeguards comprise of the following. First, that the 2nd respondent can only act upon the approval of the 1st respondent's board rather than unilaterally. Moreover the appointment focuses on a person familiar with the business of the insurer. Further, the appointed person can be



- removed by the 2nd respondent if he causes or contributes to the contravention of any provisions of the *Insurance Act*.
51. Likewise the appointment of a statutory manager is scheduled to last for a period not exceeding 12 months which can only be extended with the High Court's sanction. Lastly, there is provision in the Act that any person aggrieved by a decision by the 2nd respondent may file an appeal to the Insurance Appeals Tribunal.
 52. Considering these safeguards, Counsel submits that just because the petitioner is of the view that these statutory safeguards are inadequate, this does not form a basis for asserting that the impugned provisions are unconstitutional. Rather he notes that these are gaps that should be considered through legislative reform. On this premise, Counsel urges this Court to be guided by the principle of judicial restraint in the consideration of the petition. In addition he submits that the lack of a definitive timeframe in the Act allows the statutory managers time to effectively carry out their roles based on the circumstances of each insurer.
 53. Counsel additionally submits that appointing statutory managers is meant to protect the interests of the insurance policy holders and beneficiaries and hence in line with the *Insurance Act* as noted in the case of Kenya Commercial Bank vs. Charterhouse Bank Limited Nairobi [2006] eKLR. Additional reliance was placed on the case of Piedmont Investments Limited vs. Standard Assurance Kenya Limited and 2 Others [2010] eKLR. In essence Counsel argues that although concerns have been raised on the manner in which the statutory managers carry out their mandate, this cannot in turn be a basis for determining that the Act that appoints them is unconstitutional.
 54. In the same way, the respondents contend that no particulars have been provided to illustrate how the implementation of the respondents' respective statutory mandate amounts to a violation of the petitioner's rights. He argues that a complaint must state the provisions of *the Constitution* considered to have been infringed and the manner in which he believes they have been infringed with particularity as held in the case of Humphrey Mutege Burini and 9 others vs. Chief of the Kenya Defence Forces and another [2017] eKLR. From the foregoing, the respondents submit that they have not violated the cited constitutional rights.
 55. On the second issue, counsel notes that according to Section 67 C (3) of the *Insurance Act* the appointment of a manager may only be extended by the High Court upon the application of the Commissioner if such extension appears to the High Court to be justified in light of its discretionary authority as observed in the case of Commissioner of Insurance vs. Kenya Reinsurance Corporation (Statutory Manager) & another [2012] eKLR.
 56. He thus submits that it is only upon being convinced of the factual circumstances, the necessity of the extensions and consideration of the contentions of the stakeholders, that Courts have issued extension orders. He submits while relying on the decision in the case of African Airlines International Limited vs. Eastern and Southern African Trade and Development Bank [2003] KLR 140 that the Court is charged with the obligation to take into account all the relevant factors in the exercise of its unfettered discretion.
 57. It is submitted further that considering that a party dissatisfied with the Court's decision is at liberty to seek review or appeal against such an extension, in the same way he can apply to the Court for the appropriate relief against the 1st and 2nd respondents' exercise of statutory power as regards the various insurers. To that end, Counsel submits that the extensions of the moratoriums was within the ambit of the *Insurance Act* and thus lawful.



58. Moving on to the third issue, Counsel observes that according to the Court in the case of Council of County Governors vs Attorney General & another [2017] eKLR, a court in determining whether a statute is constitutional or not, the court must determine the object and purpose of the impugned statute. In this regard additional reliance was placed on the cases of Ndyababo vs A. G of Tanzania [2001] E. A. 495, Mugambi Imanyara & another vs. Attorney General & 5 others [2017] eKLR, Law Society of Kenya vs. Attorney General & 2 others [2013] eKLR and Katiba Institute & another vs. Attorney General & another [2017] eKLR.
59. Counsel as such submits that this Court should consider this matter from the premise and presumption that the purpose and effect of the *Insurance Act* is to protect the rights of policy holders and to provide effective regulation and offer a level playing field for all players in the insurance industry. He asserts that although the implementation of the Act's purpose has been fraught with challenges, the presumption of constitutionality has not been discharged by the petitioner. Moreover, he submits that it is not the Court's place to approve or condemn any legislative policy as observed in the case of Geoffrey Andere vs. Attorney General & 2 others [2016] eKLR.
60. To this end, Counsel submits that the law under Sections 67 C (2) (i), 67 C (3) and 67 C (10) of the *Insurance Act* has in no way hindered the rights of the public, policy holders, creditors and other affected persons to seek recourse in the courts at any material time as evidenced by the numerous cases that have been filed between the various parties. He for this reason concludes by submitting that there is no literal or purposive inconsistency between the provisions of Section 67C of the *Insurance Act* and any Articles of *the Constitution*.

4th Respondent's submissions

61. The 4th respondent filed written submissions dated 3rd February 2022 and submits that the main issues for determination are:
- i. Whether Section 67C(2)(i), (3), (4) & (10) of the *Insurance Act*, Cap.487 of the Laws of Kenya are unconstitutional and whether the Petitioner's rights under *the Constitution* have been violated;
 - ii. Whether the Petitioner made out a case for a violation of the Petitioner's rights under Articles 40(2), (3), 46, 47(1), 48 and 50(1) of *the Constitution*, if any or at all;
 - iii. Whether the Petitioner is entitled to the reliefs sought.
62. On the first issue, Counsel submits that the Court in answering this question should be guided by the dictates of Article 259 and 159(2)(e) of *the Constitution*, and the Supreme Court's guidance in the case of Re The Matter of the Interim Independent Electoral Commission Constitutional Application No 2 of 2011 where it held that the spirit and the tenor of *the Constitution* must preside and permeate the processes of judicial interpretation and judicial discretion. Similarly, additional reliance was placed on the case of Tinyefuza vs Attorney General of Uganda Constitutional Petition No. 1 of 1997 (1997 UGCC 3) and Re Kadhis' Court: The Very Right Rev Dr. Jesse Kamau & Others vs The Hon. Attorney General & Another Nairobi HCMCA No. 890 of 2004.
63. Counsel furthermore submits that in determining the constitutionality of the impugned provisions the Court should be guided first by the principle of presumption of constitutionality as set out in the cases of Ndyababo -vs- Attorney General [2001] EA 495, Bishop Joseph Kimani and Others -v- Attorney General, Committee of Experts and Another Petition No 699 of 2009 and Susan Wambui Kaguru & Others v Attorney General Another [2012] eKLR. He contends thus that unless the contrary is proved, the impugned sections of the *Insurance Act* remain constitutional.



64. Counsel also notes that the Court is to consider the objects, purpose and effect of the legislation as held in the cases of *Murang'a Bar Operators and Another -vs- Minister of State for Provincial Administration and Internal Security and Others Nairobi Petition No. 3 of 2011* [2011] eKLR, *R -vs- Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 and *Samuel G. Momanyi -vs- Attorney General and Another High Court Petition No. 341 of 2011*.
65. The impugned provisions under Section 67C of the *Insurance Act* as perceived by Counsel majorly deal with the power of the 2nd respondent to intervene in management of insurance companies. This is one of the key purposes of the Act as captured in the preamble. Counsel argues that nullification of the impugned provisions would be tantamount to having no law properly regulating the insurance business in Kenya, all to the detriment of the insurance industry.
66. Counsel therefore submits that in allowing the petition the object and purpose of the impugned law will be defeated since the appointment and mandate of statutory managers as stipulated under the impugned law will be rendered otiose. Further the manner in which moratoriums will be placed will not be clearly defined and governed and lastly that no alternative solutions have been provided in this regard.
67. On the assertion of violation of fundamental rights, he submits that the petitioner's and other parties difficulty in complying with Section 67C (2)(i), (3), (4) & (10) of the *Insurance Act* cannot be construed to be a violation of the rights of the petitioner. In addition he argues that the enforcement of the impugned law by the various bodies established under the Act has been misconstrued by the petitioner to constitute the alleged violations of its constitutional rights. Furthermore he asserts that the powers of statutory managers under the impugned law can be lawfully challenged as the Act must be compliant with *the Constitution*.
68. In light of this Counsel submits that the alleged unconstitutionality of the impugned Sections 67C (2)(i), (3), (4) & (10) of the *Insurance Act*, cannot be discerned as the petitioner has failed to rebut the general presumption of constitutionality.
69. Submitting on the last issue, Counsel states that the petitioner's allegations of violations of the rights under Articles 40(2), (3), 46, 47(1), 48 and 50(1) of *the Constitution* have neither been specifically pleaded nor sufficiently proved. Specifically, the petitioner has not established the nature of the property referred to and how it has been prevented from acquiring the said property. Additionally, how the impugned law arbitrarily deprives it of the property and restricts the enjoyment of any right under Article 40 on the basis of the grounds specified in Article 27(4) of Constitution.
70. Likewise, Counsel submits that the petitioner has not demonstrated with clear precision how the consumer rights under Article 46 of *the Constitution* have been violated by the impugned law. With reference to Article 47 Counsel submits that the petitioner has failed to demonstrate the nature of the administrative action that it alludes to and the manner the same has been violated by the respondents through the implementation of the impugned law.
71. In addition, he argues that the alleged violation of Articles 48 and 50(1) of *the Constitution* cannot be discerned because the petitioner has always accessed courts of law whenever aggrieved and has not demonstrated how it has been denied a fair hearing. In a nutshell, Counsel submits that the petitioner has not proved with sufficient precision how the alleged rights have been violated.
72. Lastly, Counsel submits owing to the case made out that the petitioner is not entitled to the reliefs sought herein.



The 1st and 2nd Interested parties submissions_

73. The firm of W.J. Ithondeka and Company Advocates on behalf of the 1st and 2nd interested parties filed written submissions dated 13th March 2020. Counsel states that the issue for determination is whether the provisions of Section 67C (2) (i), 67C (3), 67C(5) and 67C (10) of the *Insurance Act* are unconstitutional.
74. Counsel submits that although in principle the intention of Section 67C of the *Insurance Act* was to provide protection for an insurance company and facilitate its revival with winding up as the last resort, in practice however this has not been the case. This is since its inadequacy to protect the rights of all stakeholders in the statutory management process has been a painful experience as seen in the detailed account by the parties in their replying affidavit.
75. He submits in view of this that Section 67C of the Act grants the 1st respondent absolute discretion and power on the appointment of the statutory manager in essence denying the shareholders a right to their property arbitrarily. In addition, Section 67C (5) donates immense power to the manager to deal with such property which ultimately may remove such property from the shareholders. This he submits was seen when the statutory manager disposed by way of sale United Insurance Company Ltd's assets without disclosing the matter to the shareholders.
76. Counsel in the same way submits that Article 35 of *the Constitution* guarantees the right to access information held by a person for the protection of any fundamental right. On this premise he submits that the impugned provisions are contrary to this provision as access to information on the activities of the statutory manager are not guaranteed or provided for. In fact relying on the parties affidavit he notes that this information only became apparent when the audit was carried out. This was 6 years after management of the company by the statutory manager.
77. To buttress his arguments Counsel relied and urged the Court to consider the views held in the case of Sammy M. Makove, Commissioner of Insurance V Kenya Reinsurance Corporation(Statutory Manager) & Another[2012] eKLR where on the powers under Section 67C of the Act the Court observed that:

“...The power given to the applicant under Section 67C of the *Insurance Act* is supervisory in nature. Those powers are exercisable when in the opinion of the applicant an Insurer falls under the circumstances enumerated in Section 67C (1) (a) to (j). Apart from being supervisory, I am of the view that those powers are draconian for the reasons that:-

- 1) the law has not set out how and when those powers can be challenged by any person affected by their exercise,
- 2) the law has not stated for how long a statutory manager is to remain in position after appointment in that his/its appointment can continue to be extended ad infinitum,
- 3) the law has not set out procedures or given the avenue of challenging the duties of the statutory manager when those duties are not being or have not been exercised properly,
- 4) once they are exercised by the applicant, they affect not only the company involved but also the shareholders of such company who are thereafter excluded from the decision making process of the company, the insuring public who, trusting the company in question must have taken policies with



such companies, the claimants who in our reckless traffic society must have suffered injuries or death and may have lodged or have pending claims against the company.

- 5) The law has not provided for any remedies for anyone who is hurt or affected by the exercise of those powers or in the event the manager fails to act in good faith.

That, in my view is the nature of the applicant's powers under Section 67C."

The 3rd Interested party's submissions

78. The firm of Apollo and Company Advocates on behalf of the 3rd Interested party filed written submissions dated 20th November 2018. Counsel commences by submitting that the main purpose of statutory management is to protect an insurance company from losses. To do so, a statutory manager is appointed by the 2nd respondent under Section 67C (2) (i) of the *Insurance Act*. The statutory manager essentially assumes the management, control and conducts the affairs and business of the insurance company to the exclusion of the company's board of directors as stated in the case of *Blueshield Insurance Company Ltd v Alice W Kariuki & another* (2014) eKLR.
79. Further reliance was placed on the cases of *Sammy M. Makove, the Commissioner of Insurance v RSM Ashvir Consulting Ltd*(Statutory Manager Standard Assurance Kenya)2013eKLR and *Kensilver Express Ltd & 3 Others v Commissioner of Insurance & 4 others*(2007)eKLR that held a similar position. It is on this foundation that Counsel argues that the Court's supervision is key where there is lack of diligence, efficiency and good governance by the 1st, 2nd and 3rd respondents.
80. Turning over to the constitutionality of the impugned provisions Counsel submits that in light of the current Constitution these provisions are manifestly unconstitutional for the reason that the statutory manager's exercise of power cannot be challenged hence depriving parties of their right under Article 48 and 50(1) of *the Constitution*. Furthermore the provisions do not provide the avenue for this challenge or remedies for those affected.
81. Likewise, the provisions deprive, limit and restrict the right to property to the affected persons under Article 40(2) of *the Constitution*. In the same way the provisions fail to state the length of time the statutory manager's can hold the position. Additionally the provisions deprive consumers their economic interest rights and compensation under Article 46 of *the Constitution*.

Analysis and Determination

82. I have carefully considered the pleadings, submissions, case law and the law and the issues that arise for determination are:
 - i. Whether Section 67C (2)(i), 67C(3) and 67C(10) of the *Insurance Act* are an infringement to the Article 35, 40, 46, 47, 48 and 50(1) of *the Constitution* hence unconstitutional; and
 - ii. Whether the impugned provisions have violated the petitioner's rights under Article 35, 40, 46, 47 48 and 50(1) of *the Constitution*.

Whether Section 67C (2)(i), 67C(3) and 67C(10) of the *Insurance Act* are an infringement to the Article 35, 40, 46, 47, 48 and 50(1) of *the Constitution* hence unconstitutional

83. The petitioner's dominant contention is that the impugned provisions are inconsistent with *the Constitution* and hence ought to be declared unconstitutional. This assertion has been supported by the



interested parties. The respondents on the other hand oppose this contention arguing that a law cannot be declared unconstitutional because of the difficulty experienced in complying with it. They argue that a statute enjoys the presumption of constitutionality which the petitioner has failed to discharge.

84. Counsel for the respondents while submitting on this issue urged the Court to be guided by the Constitutional principles under Article 259 and 159(2) (e) of *the Constitution*. Similarly, the guidance provided by the Supreme Court in the Matter of Interim Independent Electoral Commission [2011] eKLR. This Court remains alive to its duty to interpret *the Constitution* in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the bill of rights in a manner that contributes to good governance. Additionally, it is keen to protect and promote the purposes and principles of *the Constitution*.
85. In the same way the petitioner and respondents relied on a plethora of cases that contain the now well settled principles on the topic of interpretation of a statute by the Court. The petitioner on this point relied on the cases of Council of County Governors v Attorney General and another (2017) eKLR, Geoffrey Andare v Attorney General & 2 others(2016) eKLR and Kenneth Otieno v Attorney General & another (2017) eKLR.
86. On the other hand the respondents relied on the cases of Ndyanabo vs A. G of Tanzania [2001] E. A. 495, Tinyefuza vs Attorney General of Uganda Constitutional Petition No. 1 of 1997 (1997 UGCC 3), Mugambi Imanyara & another vs. Attorney General & 5 others [2017] eKLR, Law Society of Kenya vs. Attorney General & 2 others [2013] eKLR, Katiba Institute & another vs. Attorney General & another [2017] eKLR, among many others.
87. This Court is well guided and in agreement with the views in these authorities. In a nutshell, the authorities implore this Court to be guided by a number of principles namely that; until the contrary is proved, legislation is presumed to be constitutional. Likewise, the purpose and effect of a Statute are relevant in determining its constitutionality since either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. Further that one of the key elements in construing a Statute is to ascertain the intention of Parliament as expressed in the Act. In addition it is critical to lay the Article of *the Constitution* which is invoked beside the Statute which is challenged to decide whether the latter squares with the former. Lastly, in the absence of an expressed legislative intention to the contrary, the language must ordinarily be taken as conclusive in its plain meaning.
88. Correspondingly, this Court finds useful guidance in the Supreme Court of India's case of *Hamdard Dawakhana (Wakf) Lal Kuan, Delhi & another v Union of India & Others 1960 SCR (2) 671* where the Court opined as follows:

“When the constitutionality of an enactment is-, challenged on the ground of violation of any of the Articles in Part 111 of *the Constitution*, the ascertainment of its true nature and character becomes necessary, i.e., its subject matter, the area in which it is intended to operate, its purport and intent have to be determined. In order to do so it is legitimate to take into consideration all the factors such as history of the legislation, the purpose thereof, surrounding circumstances and conditions, the mischief which it intended to suppress, the remedy for the disease which the legislature resolved to cure and the true reason for the remedy; Bengal Immunity Company Ltd. v. The State of Bihar (1); R.M.D. Chamarbaughwala v. The Union of India (2) Mahant Moti Das & Ors. v. S. P. Sahi (3).”



89. The Court went further to state as follows:-

“Another principle which has to be borne in mind in examining the constitutionality of a statute is that it must be assumed that the legislature understands and appreciates the need of the people and the laws it enacts are directed to problems which are made manifest by experience and that the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is, therefore, in favour of the constitutionality of an enactment.”

90. As a starting point it is necessary to interrogate the object and purpose of this Act to align it with the context of the impugned provisions. This is divulged in the preamble of the Act which provides as follows:

An Act of Parliament to amend and consolidate the Law relating to insurance, and to regulate the business of insurance and for connected purposes.

91. Regulation of various sectors in Kenya is not a foreign concept. In the same way existence of regulatory authorities is not a new feature in Kenya. Most industries boast of similar authorities whose purpose is for the Government to exercise control in the provision of the goods and services rendered to the citizens which is to be in accordance with the standards set out in law.

92. This was appreciated by David A. Skeel, Jr in his review titled *The Law and Finance of Bank and Insurance Insolvency The Law and Finance of Bank and Insurance Insolvency Regulation* (Texas Law Review Volume 76, Number 4, March 1998) where he observed that ‘because banks, insurance companies, and related financial intermediaries play an important role in the financial security of the citizenry, the government has a strong interest in assuring their soundness and in preventing systemic failures that can lead to financial devastation.’

93. In our case, the Insurance Regulatory Authority, the 1st respondent is charged under Section 3A of the *Insurance Act* with the mandate to:

3A. Objects and functions of the Authority

- (1) The objects and functions of the Authority shall be to—
 - (a) ensure the effective administration, supervision, regulation and control of insurance and reinsurance business in Kenya;
 - (b) formulate and enforce standards for the conduct of insurance and reinsurance business in Kenya;
 - (c) license all persons involved in or connected with insurance business, including insurance and reinsurance companies, insurance and reinsurance intermediaries, loss adjusters and assessors, risk surveyors and valuers;
 - (d) deleted by Act No. 1 of 2014, s. 3;
 - (e) deleted by Act No. 1 of 2014, s. 3;
 - (f) advise the Government on the national policy to be followed in order to ensure adequate insurance protection and security for national assets and national properties;
 - (g) issue supervisory guidelines and prudential standards from time to time, for the better administration of the insurance business of persons licensed under this Act;



- (h) conduct inquiries and share information with other regulatory authorities and to carry out any other related activities in furtherance of its supervisory role;
 - (ha) educate the public regularly on the right to independently select an underwriter or broker from a list of underwriters or brokers licensed by the Authority;
 - (hb) regulate the business of bacc assurance offered by banks in the same manner as the ordinary insurance business including capital requirements and disclosures;
 - (i) undertake such other functions as may be conferred on it by this Act or by any other written law.
 - (2) For better clarity, the objects of the supervision of insurers and reinsurers by the Authority under this Act shall be—
 - (a) to promote the maintenance of a fair, safe and stable insurance sector;
 - (b) to protect the interest of the insurance policyholders and beneficiaries; and
 - (c) generally to promote the development of the insurance sector.
 - (3) The Authority shall publish the standards formulated under subsection (1) (b) and may provide for the punishment of a person who contravenes any of the standards by a fine not exceeding five million shillings or to imprisonment for a term not exceeding five years or to both such fine and imprisonment.
94. The 1st respondent through its Board appoints the Commissioner of Insurance referred to as the Chief Executive officer under Section 3E of the Act to run the daily affairs of the Authority.
95. The impugned provisions are accordingly found under Section 67C of the *Insurance Act*, Cap 487. The powers are many, so I shall only provide for the impugned ones.
- (2) The Commissioner may, with the approval of the Board—
 - (i) appoint a competent person familiar with the business of the insurer (in this Act referred to as “a manager”) to assume the management, control and conduct of the affairs and business of an insurer to exercise all the powers of the insurer to the exclusion of its Board of Directors, including the use of its corporate seal;
 - (3) The appointment of a manager shall be for such period, not exceeding twelve months, as the Commissioner shall specify in his instrument of appointment and may be extended by the High Court, upon the application of the Commissioner if such extension appears to the High Court to be justified.
 - (10) For the purposes of discharging his responsibilities, a manager shall have power to declare a moratorium on the payment by the insurer of its policy-holders and other creditors and the declaration of a moratorium shall—
 - (a) be applied equally to all classes of policy-holders and creditors, subject to such exemptions in respect of any class of insurance as the manager may, by notice in the Gazette specify;



- (b) suspend the running of time for the purposes of any law of limitation in respect of any claim by any policy-holder or creditor of the insurer;
- (c) cease to apply upon the termination of the manager's appointment whereupon the rights and obligations of the insurer, its policy-holders and creditors shall, save to the extent provided in paragraph (b), be the same as if there had been no declaration under the provisions of this subsection:

Provided that this subsection does not apply to any sum due as contributions or penalties to the Policy holder Compensation Fund.

- (11) For the purpose of this section, where a moratorium is declared under subsection (10), a policyholder shall not be liable to pay any claim not payable by the insurer due to the moratorium.
96. Evidently the impugned Section deals with the power of the Commissioner of Insurance, (the 2nd respondent) to intervene in the management of insurance businesses in the circumstances outlined under Section 67C (1) but majorly insurance companies that are failing in view of the dictates of the Act. In light of this the petitioner challenges the 2nd respondent's power to appoint a person familiar with the business of the insurer to assume the management, control and conduct of the affairs and business to the exclusion of its board of directors.
97. Secondly, the appointment of a manager for a period not exceeding 12 months, as the 2nd respondent shall specify which may be extended by the High Court and lastly for the purposes of discharging his responsibilities, the manager has power to declare a moratorium on the payment by the insurer of its policy-holders and other creditors.
98. My interpretation of the above provision is that the purpose of this law is to regulate insurance business in Kenya. Primarily the effect is that the government through the 1st and 2nd respondents controls this regulation by arming the 2nd respondent with broad intervention powers designed to both avoid and respond to the ultimate failure of an insurance company due to insolvency and the other cited reasons under Section 67C(1). The language of the Act is clear in this regard with no ambiguity articulated in the impugned provisions. In my opinion this is in line with the purpose of the Act as enshrined in the preamble.
99. Turning to the contention in issue, the petitioner argues that the impugned provisions are inconsistent with and violate Articles 40, 46, 47, 48 and 50(1) of *the Constitution* and hence unconstitutional. According to the petitioner the 1st and 2nd respondents have abused their power and are in breach of their duty which is offensive to *the Constitution*. They make known that the impugned provisions make room for affected parties to be deprived of their rights under Article 40, 46, 47 and 50(1) of *the Constitution*. Concurring with the petitioner, the interested parties contended that statutory management has caused more harm than good.
100. The respondents on the other hand vigorously disputed these assertions arguing that the allegation of violation of the constitutional rights was unjustified. In their view no particulars had been provided to show how the implementation of the respondents' statutory mandate amounted to violation adding that Article 24 of *the Constitution* makes room for limitation of rights in a manner that is reasonable and justifiable. If anything they noted that they had exercised their power and mandate in good faith and under strict supervision of the High Court.



101. At face value a reading of *the Constitution* against the impugned provisions makes it reasonable to conclude that they restrict the affected parties' rights. According to Article 24 of *the Constitution* this is not acceptable unless one seeking to occasion the restriction can justify the limitation.

102. The importance of examining the constitutionality of a provision in a statute that purports to limit Article 24 of *the Constitution* was aptly captured in the case of *Geoffrey Andare v Attorney General* (supra) where the court opined as follows:-

“69. To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": *R. v. Big M Drug Mart Ltd.*, supra, at p. 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

70. Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": *R. v. Big M Drug Mart Ltd.*, supra, at p. 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R. v. Big M Drug Mart Ltd.*, supra, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".

103. At this juncture a deeper interrogation and examination of the impugned provisions in context of the whole Act is prudent. In my understanding the wording of Section 67C in no way states that the appointment of statutory management is a final end. Instead it's a means to achieve the intended purpose. The dictates and purpose of the Act reveal that statutory management is one of the regulatory measures employed in the insurance industry to attempt to salvage an insurance company's end. What does this mean therefore? The Court in the case of *Sammy M. Makove, Commissioner of Insurance*(supra) that was relied on by both the petitioner and interested parties puts this in context as follows:

“...The power given to the applicant under Section 67C of the *Insurance Act* is supervisory in nature.”

104. In my view this means that the statutory manager acts as a custodian of the company on a temporary basis with the goal of preserving all affected parties interests and ensuring compliance with the law. Appreciating the possibility of abuse of this role the Act stipulates clear guidelines in operation of this Section during the period the insurance company is under the care of the statutory manager. I would like to list the guidelines below:



- i. Section 67C(3) ‘The appointment of a manager shall be for such period, not exceeding twelve months, as the Commissioner shall specify in his instrument of appointment and may be extended by the High Court, upon the application of the Commissioner if such extension appears to the High Court to be justified.’
 - ii. Section 67C(4) A manager shall, upon assuming the management control and conduct of the affairs and business of an insurer, discharge his duties with diligence and in accordance with sound insurance, actuarial and financial principles and, in particular, with due regard to the interests of the insurer, its policy-holders and the insuring public in general.
 - iii. Section 67C (9) Neither the Commissioner or any other officer or employee of the Commissioner, nor the manager nor any other person appointed, designated or approved by the Commissioner under the provisions of this Part shall be liable in respect of any act or omission done in GOOD FAITH in the execution of the duties undertaken by him.
105. In the same way, the Act proceeds to provide redress to affected parties through establishment of a Tribunal to hear such grievances under Section 169 of the Act. In particular to this case, Section 173 provides for appeals from the Commissioner’s decisions. This Section provides as follows:-
1. A person aggrieved by a decision of the Commissioner under this Act may, within one month from the date on which the decision is intimated to him, appeal to the Tribunal which may, subject to such terms and conditions as it may consider necessary, uphold, reverse, revoke or vary that decision.
 2. Except as provided in this section the decision of the Tribunal on an appeal made to it under subsection (1) shall be final and conclusive.
 3. A person aggrieved by a decision of the Tribunal made under subsection (1) may, if it involves a question of law, within one month from the date on which the decision is intimated to him, appeal therefrom to the court.
 4. A reference in this section to a question of law does not include a reference to a question whether there is sufficient evidence to justify a finding.
 5. The Chief Justice may make rules for regulating the practice and procedure in connection with an appeal under subsection (3) and for the better carrying into effect the provisions of that subsection.
106. From the foregoing I am inclined to disagree with the petitioner and interested parties notion that the impugned provisions run a foul the constitutional principles. I say so because the limitation on the affected party’s property is reasonable in view of the fact that the intention is to ascertain whether the company can be revived and if not be liquidated and affected parties compensated. This as can be seen from the preamble is one of the regulatory aspects of the Act with respect to public interest. In the end the affected parties’ right to their property is preserved and protected in light of Article 40 and 46 of *the Constitution*.
107. Turning over to the petitioner’s right to fair administrative action, right to access justice and right to a fair hearing, the Act provides a dispute resolution mechanism which the parties can utilize to challenge the decisions of the 2nd respondent and the statutory manager. If dissatisfied with the Tribunal’s decision the parties are at liberty to challenge the same in Court. Ideally, as per the material before this Court, it has not been shown that the petitioner or interested parties in seeking to enforce these rights



were denied the opportunity. As rightly pointed out by the respondents, both the petitioner and the interested parties have been able to access justice within the Court jurisdiction.

108. The Act divulges that the 2nd respondent and his employees are to be held accountable for any act done in bad faith. The consequence of this is discernable from the 3rd interested party's averments where it is noted that failure by the 2nd and 3rd respondents to avail a report and statement of affairs of the company with reference to Blue Shield Insurance Company Limited's rental income caused the shareholders to report the matter to the Directorate of Criminal Investigations (DCI).
109. Similarly, while the 1st and 2nd interested parties assert that the right to information is limited by the impugned provisions, a reading of the Act does not divulge any section that limits the affected parties right to access the Company's information while it is under statutory management. It is hence my opinion that this allegation is inaccurate in light of the dictates of the Act.
110. Moving on to the second issue, the petitioner and interested parties assert that the rights of the affected parties were violated under the cited constitutional provisions. This argument was rejected by the respondents who argued that this allegation had not been specifically pleaded nor sufficiently proved as set out in the Anarita Karimi Njeru (supra) case.
111. In the case of Husus Mugiri v Music Copy Right Society of Kenya & another [2018] eKLR in this regard opined as follows:

“ 18. In order for a petition to qualify to be a constitutional petition that seeks to enforce or protect fundamental rights and freedoms under the bill of rights, it must meet the test set in Anarita Karimi Njeru vs. Republic [1979] eKLR. That is, the applicant must specify which specific provisions of *the Constitution* that declare the rights, the specific rights and freedoms that have been or are threatened to be infringed or violated and the manner in which the respondent has infringed the subject rights. This position has been reiterated time and again.”

112. I do find that the petitioner and interested parties have not properly and with the required precision demonstrated how their rights and the rights of the affected parties were infringed upon by the respondents herein. They have merely quoted the provisions of *the Constitution* against the impugned provisions but have not explained in enough detail how those rights have been infringed by the impugned provisions.
113. I say so because while the interested parties say their right under Article 35 of *the Constitution* is violated they fail to demonstrate the manner in which they actively pursued this information and were denied access to it and the Section that stipulates this limitation. Additionally Counsel fail to show how the regulation of insurance companies owing to the cited circumstances in Section 67C (1) is unreasonable in light of Article 40 and 46 of *the Constitution*. How does the object of preservation and protection of the insurance company and its assets infringe on these rights? This has not been shown.
114. Counsel in addition cite Article 47, 48 and 50(1) of *the Constitution* without giving any explanation While the respondents have shown that the Act provides a dispute resolution mechanism for the aggrieved parties to challenge decisions and access justice, the manner in which these rights have been denied is not factually shown by the petitioner. In light of this it cannot be left to the Court to speculate on behalf of the petitioner and to 'fill the gaps in their pleadings. The burden lies on the petitioner and in this case, this burden has not been discharged.



115. From the foregoing analysis, although the impugned provisions appear to limit the right under Article 40 of *the Constitution*, the limitation is appropriately justified in line with Article 24 (1) of *the Constitution*. Additionally the limitation is proportionate to the interests stated in Article 24 (1) (d) keeping in mind the purpose and effect of the law in question. Furthermore reading the impugned provisions against *the Constitution* does not divulge any contradiction to the alleged violated rights.
116. The operation of the impugned provisions as a safeguard is being exercised under the supervision of the High Court. The impugned provision in my opinion is clear in its wording revealing the drafters intent. The Moratorium has been extended severally by the High Court. Why has the petitioner not raised issues in those cases opposing the extension? Why has the extension if offensive to the petitioner not been challenged as provided for in the Law? Before the extension is done the Court must be satisfied that the request is well deserving.
117. In my view, the impugned provisions are necessary in the interest of the public to uphold sound regulation in the insurance sector. It is my humble finding therefore that Section 67C (2)(i),67C(3) and 67C(10) of the *Insurance Act* are constitutional and do not violate Articles 35, 40, 46, 47, 48 and 50(1) of *the Constitution*.
118. That said it is my observation that the bone of contention in this matter is presented as the deficiency of the impugned provisions. In my inference the discernable issue is the performance of the objectives of the impugned sections by the 1st, 2nd and 3rd respondent. The cry of the parties is that the performance of the stipulated mandate has severely prejudiced them. My two cents on the matter is that the 1st, 2nd and 3rd respondents remain accountable and bound by the dictates of Article 10(2)(c) of *the Constitution*. Where they fail to discharge their mandate in accordance with the dictates of the Act and *the Constitution*, an affected party is at liberty to seek redress in Court. Furthermore if the Act as alleged does not hold the statutory manager accountable the answer is not in declaring it unconstitutional because it is not unconstitutional. The solution is having it amended.
119. My conclusion is that the petitioner has failed to prove that it is deserving of the orders sought. The petition lacks merit and is hereby dismissed. Being a public interest petition I hereby order that each party bears its own costs.

Orders accordingly.

DELIVERED VIRTUALLY, SIGNED AND DATED THIS 31ST DAY OF MAY, 2022 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. Ong'udi

Judge of the High Court

